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Name: Lauren Keefe

JUDICIAL SELECTION COMMISSION

Application for Judicial Vacancy on the New Mexico Court of Appeals

APPLICATION

PERSONAL

1. Full Name	Lauren Keefe
2. County of Residence	Bernalillo
3. Birthplace	Endicott, New York
4. If born outside the US, give the basis for your citizenship	
5. Birth Date	April 12, [redacted]
6. Marital Status	Single
7. If married, list spouse's full name	
8. Spouse's occupation	

9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts.

Answer 9: No

10. List all places of residence, city and state, and approximate dates for the last 10 years

Date(s)of Residence	Street Address	City	State	Zip
October 2005 to present	207 Wellesley Drive SE	Albuquerque	NM	87106

EDUCATION

11. List schools attended with dates and degrees (including all post-graduate work)	
High School(s)	Sharon High School, Sharon, Mass. 1983-1987 High school diploma
College(s)	Tufts University 1987-1993 Bachelors of arts in economics
Law School(s)	University of New Mexico 1998-2001 Juris doctorate

12. Bar Admissions and Dates	New Mexico 2001 Tenth Circuit 2005

EMPLOYMENT

13. List Your Present Employment	
Date(s) of Employment	September 2003 to present
Employer	Peifer, Hanson & Mullins, P.A.

Mailing Address	P.O. Box 25245 Albuquerque, NM 87125
Business Phone	505-247-4800
Position	Shareholder
Duties	Representation of clients in civil disputes
Supervisor	Charles R. Peifer

14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	September 2002 to August 2003
Employer	Justice Petra Maes
Mailing Address	P.O. Box 2008 Santa Fe, NM 87501
Business Phone	505-827-4889
Business FAX	505-827-4837
Employer's Email Address	suppjm@nmcourts.gov
Position	Law Clerk
Dates of Employment	September 2001 to August 2002
Employer	Judge Lynn Pickard (ret.)
Position	Law Clerk
Dates of Employment	Summer 2000
Employer	Keleher & McLeod
Mailing Address	201 Third Street NW #1200 Albuquerque, NM 87103-1626
Business Phone	505-346-9140
Business FAX	505-827-4837
Employer's Email Address	so@keleher-law.com
Position	Law Clerk
Dates of Employment	Summer 1999
Employer	Jay R. Hone
Mailing Address	3106 Hogan Court
Business Phone	505-301-1868
Employer's Email Address	jayhone@aol.com
Position	Law Clerk
Dates of Employment	1993 to 1998
Employer	Community Newspaper Company
Position	Reporter/Editor
Dates of Employment	1991 to 1993
Employer	University of Massachusetts-Boston
Position	Department Assistant

Note: No. 14 is a separate table which enables you to copy and paste it as many times as necessary to list all previous employers.

PARTNERS AND ASSOCIATES

15. List all partners and associates, beginning with the current or most recent:
Answer 15: **Current Partners** Charles R. Peifer Robert E. Hanson Matthew R. Hoyt Mark T. Baker **Former Partners** Cerianne L. Mullins (now of counsel) **Current Associates** Gregory P. Williams (of counsel) Elizabeth R. Radosevich Matthew E. Jackson Carter B. Harrison IV J. Walker Boyd **Former Associates** Benjamin Silva (of counsel) Angela Martinez (of counsel) Christopher Saucedo Tiffany E. (Dowell) Lashmet Amanda Connor John Hall **Former Supervisor** Jane Wishner

EXPERIENCE

16. How extensive is your experience in Personal Injury Law?
Answer 16: I have handled or worked on multiple personal injury cases, representing both plaintiffs and defendants. This includes wrongful death cases, automobile accidents, trip-and-fall cases, and assault cases.
17. How extensive is your experience in Commercial Law?
Answer 17: I have handled or worked on multiple cases involving commercial disputes. This includes numerous employment disputes, disputes regarding the ownership or sale of business associations, a wage and hour class action, multiple class actions involving royalty payments on the production of natural gas, and a dispute regarding state road contracts.
18. How extensive is your experience in Domestic Relations Law?
Answer 18: I have had no direct experience in domestic relations law.

19. How extensive is your experience in Juvenile Law?

Answer 19: I have not had any experience in juvenile law.

20. How extensive is your experience in Criminal Law?

Answer 20: I have not had any experience in criminal law.

21. How extensive is your experience in Appellate Law?

Answer 21: I have handled or worked on approximately 20 appeals and have argued before the New Mexico Court of Appeals and the Tenth Circuit Court of Appeals.

22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.

Answer 22: I have not tried any cases to a jury.

23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.

Answer 23: I was lead counsel on one arbitration and one hearing before the Administrative Hearings Office, which was in June 2017.

24. How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.

Answer 24: I have handled or worked on approximately 20 appeals. In the last two years I have handled the following appeals:

- *Turner v. First New Mexico Bank* (New Mexico Court of Appeals No. 33,303), 2015-NMCA-068, 352 P.3d 661: Prepared response to Petition for Certiorari seeking review of New Mexico Court of Appeals decision, which affirmed the dismissal of all claims bought against First New Mexico Bank based on the failure to state a claim and the application of preclusion doctrines. The New Mexico Supreme Court denied certiorari.
- *New Energy Economy, Inc. v. Lyons, et al.* (No. S-1-SC-35533): Prepared response to Writ of Mandamus seeking to prevent four members of the Public Regulatory Commissioner participating in a vote on the application from the Public Service Company of New Mexico in connection with the abandonment of units at the San Juan Generating Station. The Petition was denied.
- *Aguilar v. Christus Health* (Court of Appeals No. 35,157): Prepared response to proposed summary reversal of district court decision dismissing claims under the Unfair Practices Act brought against a hospital. After the briefs were submitted, the Court of Appeals did not follow through with summary reversal and instead assigned the case to the general calendar.
- *Hatten-Gonzales v. Earnest* (Tenth Circuit Case No. 16-2064): Prepared appeal from 2016 ruling extending the scope of a consent decree entered in 1998. The Tenth Circuit declared the case moot after the injunction entered by the district court expired under its own terms.
- *Young v. Wilham* (New Mexico Court of Appeals No. 34,379): Successfully defended district court decision dismissing claims of defamation based on articles in the *Albuquerque Journal* exposing violations of policy in connection with the Albuquerque Police Department's reserve program. The New Mexico Supreme Court denied certiorari on August 3, 2017.
- *Tucson Electric Power Company v. New Mexico Taxation & Revenue* (No. 35,781): Preparing response to a taxpayer's appeal of a decision denying a refund for sales of natural gas under a statute permitting deductions from the gross receipts tax for receipts from the sales of chemicals in lots in excess of 18 tons. Answer Brief due September 21, 2017.

I was the lead drafter on each of these matters. I have also assisted colleagues in at least five other appellate matters during the past two years.

PUBLIC OFFICES/PROFESSIONAL & CIVIC ORGANIZATIONS

25. Public Offices Held and Dates	
Public Office	Dates

26. Activities in professional organizations, including offices, held, for last 10 years		
Professional Organization	Position Held	Dates
New Mexico Women's Bar Association	Member of the Board of Directors/Secretary/ Treasurer	2011-2015
Appellate Rules Committee	Member	2014 to the present

27. Activities in civic organizations, including offices, held, for last 10 years		
Civic Organization	Position Held	Dates

28. Avocational interests and hobbies
Answer 28: Hiking

29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.
Answer 29: [redacted]
30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify
Answer 30: [redacted]
31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.
Answer 31: [redacted]
32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?
Answer 32: [redacted]
33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?
Answer 33: [redacted]
34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).
Answer 34: No
35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?
Answer 35: No
36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation of the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?

Answer 36: n/a

37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?

Answer 37: n/a

38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.

Answer 38: Yes

39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.

Answer 39: No

40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:

Answer 40: No

41. Do you foresee any conflicts under the NM Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.

Answer 41: No

42. Do you meet the constitutional qualifications for age, residency, and years of practice for the judicial office for which you are applying? Please explain.

Answer 42: Yes. I am at least 35 years old, have been in the actual practice of law for at least ten years, and have resided in this state for at least three years.

43. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well suited for it.

Answer 43: I am applying for the current vacancy on the New Mexico Court of Appeals because I enjoy writing about and analyzing the law and believe that I can apply my skills and experience to help shape New Mexico law going forward.

I decided to apply for law school after the first time I read an appellate decision. At the time, I was a newspaper editor working in Malden, Mass. I was covering a case involving a mother and daughter who were convicted in the 1980s of molesting multiple students at their day care center. It was largely believed that the allegations against them were false and that they were the victims of mass hysteria. After years of appeals, the Massachusetts Supreme Judicial Court reversed their convictions, determining that the trial format violated their Sixth Amendment right to confrontation. As part of my duties as the editor covering the story, I reviewed the 50-page opinion to determine why the Court had reached that decision. I found myself fascinated by the process that the Court went through to make its decision.

After law school, I clerked for two years and had the privilege to participate in the process of developing the law. With each new assignment, I relished the opportunity to delve into case precedent, see how the law had developed, consider how existing law should apply to a particular case and -- when applicable -- contemplate what rules that New Mexico should adopt to achieve just results in future cases. I continued to focus on these issues, to the extent possible, in my practice going forward. I have been the lead appellate attorney at my firm and have handled the firm's major appeals, as well as major briefing to the district court. I believe that through this experience I have developed a strong ability to analyze the law and explain the law in a clear, understandable way. I believe that I could apply these skills as a member of the Court of Appeals and help to both ensure that opinions are delivered in a timely fashion and to determine the best rules and standards to apply in New Mexico.

44. Does submission of this application express your willingness to accept judicial appointment to the New Mexico Court of Appeals if your name is chosen by the Governor?

Answer 44: Yes

Items to be Submitted in Separate Document(s)

1. Please have **at least two, but not more than five**, letters of recommendation submitted directly to The Chair of the Judicial Selection Commission. Include letters from one or more professional adversaries. **If more than five letters are submitted, only the first five received will be submitted to the Commission.** Letters of recommendation may be scanned to be part of the application; however, **the original letters must be mailed directly from the source to the Judicial Selection Office.**
2. Please attach a list of no more than eight (8) references.
3. Please enclose **one** legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance. Please submit no more than 20 pages.
4. You may also attach a copy of **one** other publication you have written which you feel would be relevant to the Commission's consideration of your qualifications. For this too, please submit no more than 20 pages. If you include more than one additional publication, only one will be presented for the Commission's review. The others will be retained on file with the rest of your application materials.
5. If you have, currently or in the past, suffered from any mental, physical or other condition that would affect your ability to perform the essential duties of a judge, and which has not been disclosed above, please describe the nature of such condition and your treatment and explain how it would affect your service. You may answer this request, as well as Questions 29 and 30, by submission of a separate confidential letter. If you wish the letter to remain confidential, please mark "CONFIDENTIAL" at the top of the first page of the letter. The information will be made available to each commissioner and otherwise hold the information confidential to the extent allowed by law.

[Instructions: All of the answers stated in this application must be affirmed as true under penalty of perjury, by self-affirmation.]

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s/: *Lauren Keefe* Date: August 15, 2017

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Sup. Ct. No. 32,524

REPUBLICAN PARTY OF NEW MEXICO, and LYN OTT, individually and in her capacity as Help America (HAVA) Director for the Republican Party,

Plaintiffs/Appellants,

vs.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT, MOTOR VEHICLE DIVISION, and LUIS CARRASCO, custodian of records for the New Mexico Taxation and Revenue Department, Motor Vehicle Division,

Defendants/Appellants.

PLAINTIFFS/APPELLANTS' BRIEF IN CHIEF

On Appeal from the Second Judicial District Court, County of Bernalillo
Honorable Valerie A. Huling and Nan Nash, No. D-202-CV-2006-08812

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which is also subject to review *de novo*. *See Public Serv. Co. of N.M. v. Lyons*, 2000-NMCA-077, ¶ 10, 129 N.M. 487, 10 P.3d 166.

ARGUMENT

This Court should establish conclusively that there is no deliberative process exception to IPRA. In the alternative, the Court should only allow a claim of deliberative process privilege under narrow circumstances upon a showing and specific judicial findings that the documents contain deliberations regarding a pending policy decision, that they do not shed any light on government misconduct, and that the need to maintain the confidentiality of those particular documents outweighs the public's interest in disclosure. Thus, if the Court does recognize a deliberative process exception to IPRA, the Court should reject the amorphous test articulated by the Court of Appeals and on that basis should reverse the decisions of the trial court and the Court of Appeals allowing MVD to claim executive privilege in connection with the information it redacted from the records produced to Plaintiffs.

The Court should also take this opportunity to define the term "research," as it is used in the DPPA and the NMDPPA, in a way that would allow the disclosure of driver's license information for the type of investigations Plaintiffs sought to undertake in this case. The Court should further hold that MVD cannot withhold information based on speculation that the recipient may misuse the information,

but in such circumstances should craft a more narrowly tailored remedy that allows citizens to engage in a use permitted under the statute.

I. THE COURT OF APPEALS ERRED IN ENGRAFTING A DELIBERATIVE PROCESS EXCEPTION ONTO IPRA.

The question in this case is whether a government agency can rely on the deliberative process privilege as a basis to withhold documents or information from the public when responding to an IPRA request. Because IPRA does not include an exception for the deliberative process privilege, and because the adoption of that privilege would undermine the legislatively adopted policy in favor of transparency in government operations, the answer should be no.

IPRA embodies the principle that "[p]ublic business is the public's business." *Newsome v. Alarid*, 90 N.M. 790, 795, 568 P.2d 1236, 1241 (1977) (internal quotation marks and citation omitted). In enacting the statute, the Legislature issued the following declaration:

> Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act ... is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

§ 14-2-5. Accordingly, the statute provides that "[e]very person has a right to inspect any public records of this state" and sets out procedures to allow any person to inspect records maintained by government agencies upon request. *See* § 14-2-1(A) and §§ 14-2-8 to -12. Under the express terms of the statute, a government agency can only withhold documents that have been requested under IPRA if those records fall into one of the twelve enumerated exceptions to the disclosure requirement. *See* § 14-2-1(A) (listing exceptions). There is no exception for the deliberative process privilege.

Despite the absence of an express deliberative process exception to IPRA, the Court of Appeals concluded that such an exception exists either by implication or by constitutional mandate. *See* Opinion ¶¶ 18-20, 22-24, 23. Either conclusion would be in error. First, it would invade the province of the Legislature to read additional exceptions into IPRA. Second, the doctrine of separation of powers does not require recognition of this particular privilege. Moreover, recognition of the privilege would undermine the very purpose of IPRA. Accordingly, this Court should reverse the Court of Appeals' decision engrafting a deliberative process exception onto IPRA.

A. The Legislature Chose Not To Include An Exception for the Deliberative Process Privilege in IPRA.

If the Legislature intended to include an exception for the deliberative process privilege, it easily could have done so. Indeed, it had a ready model

available in the exemption to the Freedom of Information Act, 5 U.S.C. § 552(b) ("FOIA"), for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation," which has been interpreted as allowing federal agencies to rely on the deliberative process privilege to withhold records responsive to a FOIA request. *See Environmental Protection Agency v. Mink*, 410 U.S. 73, 86-87 (1973) (interpreting FOIA exemption five). The Legislature also could have followed several other states which have adopted statutes with language based on FOIA exemption five, and which have interpreted those statutes as incorporating the deliberative process privilege. *See, e.g., Times Mirror Co. v. The Superior Court of Sacramento County*, 813 P.2d 240, 248-52 (Cal. 1991) (interpreting the exception to the California Public Records Act for "preliminary drafts, notes or ... memoranda" to incorporate the deliberative process privilege as defined by the federal courts in interpreting FOIA exemption five).[4]

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[4] *See also Stromberg Metal Works, Inc. v. Univ. of Md.*, 854 A.2d 1220, 1228 (Md. Ct. App. 2004) (interpreting language identical to FOIA exemption five in the Maryland Public Information Act, Md. Code Ann., § 10-618(b) as incorporating the deliberative process privilege); *Herald Co., Inc. v. E. Mich. Univ. Bd. Of Regents*, 693 N.W.2d 850, 857-58 (Mich. Ct. App. 2005) (interpreting the exemption for "[c]ommunications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action" in the Michigan Freedom of Information Act, Mich. Comp. Laws § 15.243(1)(m), to create a more limited exception than FOIA exemption five); *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351, 359-61 (Tex. 2000)

The Legislature had multiple opportunities to follow this path. New Mexico's original public records statute, adopted prior to the enactment of FOIA, included only four exceptions to the mandate that "[e]very citizen of this state has a right to inspect any public records of this state." *See Newsome*, 90 N.M. at 793-94, 568 P.2d at 1239-40 (interpreting NMSA 1953, § 71-5-1 (1975)). In 1993, many years after the enactment of FOIA, the Legislature amended IPRA to enumerate a more specific set of exceptions. Additional exceptions were added through subsequent amendments. While adopting specific these exceptions to the general rule allowing for inspection of public records, the Legislature never chose to include an exception for the deliberative process privilege.

Not only did FOIA provide a model that the Legislature could have followed if it intended to incorporate the deliberative process privilege into IPRA, but the Legislature would have been aware, when deciding what exceptions to include in IPRA, of the arguments for and against the allowance of that privilege when

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(interpreting language identical to FOIA exemption five in the Texas Public Information Act, Tex. Code Ann. § 552.111, as incorporating the deliberative process privilege); *The Daily Gazette Co. Inc. v. The West Virginia Corp.*, 482 S.E.2d 180, 187-88 (W. Va. 1996) (interpreting exception for "internal memoranda or letters received or prepared by any public body" in the West Virginia Freedom of Information Act, W. Va. Code § 29B-1-4(8), as incorporating the deliberative process privilege); *but see Freudenthal v. Cheyenne Newspapers, Inc.*, 233 P.3d 933, 936-37 (Wyo. 2010) (suggesting that documents would only be exempt under the FOIA language creating an exemption for memoranda "which would not be available to a [private] party ... in litigation with the agency" if the courts had already recognized a deliberative process privilege).

considering the exceptions to IPRA. In a case interpreting the prior version of the statute, this Court suggested that documents reflecting the "thought processes" of government officials were not public records and thus were not subject to disclosure under that version of IPRA, and thus endorsed, at least to some extent, the reasoning supporting the application of the deliberative process privilege. *See Sanchez v. Bd. of Regents of E. New Mexico Univ.*, 82 N.M. 672, 675, 486 P.2d 608, 611 (1971). Two justices issued a strong dissent and argued that documents showing how government officials reached their decisions are the very type of documents that should be publicly available "so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully, and completely performing their functions as public servants." *Id.* at 677, 486 P.2d at 614 (Oman, J. and Stephenson, J., dissenting) (quoting *MacEwan v. Holm*, 359 P.2d 413, 418 (Or. 1962)). Although not expressly overruling *Sanchez*, this Court later adopted the reasoning of the dissent. *See Newsome*, 90 N.M. at 795, 568 P.2d at 1241 (quoting extensively from *MacEwan*). The Legislature then adopted a definition of "public records" that rejects the interpretation offered by the *Sanchez* Court. *See* § 14-2-1. If the Legislature agreed with the *Sanchez* Court, it could have included an exception for documents reflecting the mental or deliberative processes of government officials. That it did not suggests that the Legislature agreed with the contrary view.

The Legislature would have also known, when deciding what exceptions to include in IPRA, that other state statutes omitting any provision similar to FOIA exemption five have been interpreted as excluding the deliberative process privilege, and thus if it intended to include such an exception it would need to do so expressly. *See, e.g., In re Mark Dunlea*, 389 N.Y.S.2d 423, 425 (N.Y. App. Div. 1976) (agency could not invoke the deliberative process privilege to withhold statistical records that it relied on as part of its decision-making process because New York's statute required disclosure); *The News and Observer Publishing Co., Inc. v. Poole*, 412 S.E.2d 7, 18 (N.C. 1992) (because the North Carolina Public Records Law contains no exception for the deliberative process privilege, and does not contain language similar to FOIA exemption five, government commission could not rely on that privilege to withhold requested documents from the public).

By omitting an express exception for the deliberative process privilege, the Legislature expressed its clear intent to preclude New Mexico agencies from relying on that privilege to withhold records responsive to an IPRA request. *See State ex rel. Citizens for Quality Educ. v. Gallagher*, 102 N.M. 516, 519, 697 P.2d 935, 938 (1985) (where other statutes contain express provisions, the Legislature's omission of similar language from a particular statute is presumed to be intentional). It was error, therefore, for the Court of Appeals decision to read the statute as including such an exception.

B. The Deliberative Process Privilege Should Not Be Read Into IPRA by Implication.

Despite the Legislature's express choice to omit any exception for the deliberative process privilege, MVD has asserted that the privilege -- indeed, any recognized evidentiary privilege -- is an implied term of IPRA's final, catch-all exception providing that a government agency can withhold records "as otherwise provided by law." *See* § 14-2-1(A)(12). Because the Legislature could have included a deliberative process privilege but chose not to, the statute should not be read to include such an exception. *See Hansman v. Bernalillo Co. Assessor*, 95 N.M. 697, 700, 625 P.2d 1214, 1217 (Ct. App. 1980) (c ourts "may not read language into a statute that is not there ... ."). This is particularly true because the Legislature expressly adopted exceptions based on some of the evidentiary privileges adopted by this Court while omitting others. *See* § 14-2-1(A)(1), (4) and (5) (incorporating provisions that recognize the physician-patient privilege and the confidential informant privilege, and expressly incorporating the attorney-client privilege and privilege for trade secrets). The Legislature's decision to incorporate some privileges but not others provides strong evidence that it did not intend to incorporate any other privileges by implication.

Even assuming, however, that the "as otherwise provided by law" provision incorporates additional evidentiary privileges not expressly included in the statutory text, the deliberative process privilege would not be among those

privileges. This Court recognizes only those privileges that it has adopted through the rules of evidence. *See Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 11, 139 N.M. 671, 137 P.3d 611 ("[W]e remain compelled to decline to recognize common law privileges. ... Unless such privileges are required by the Constitution, or provided for in the rules of evidence or other court rules, these privileges do not exist."). Because there is no rule of evidence adopting the deliberative process privilege, IPRA's "as otherwise provided by law" provision would not establish a deliberative process exception even if that provision incorporated all of the Court's evidentiary privileges. Accordingly, IPRA's catch-all exception cannot be read as creating an implied exception for the deliberative process privilege.

C. Recognition of the Deliberative Process Privilege Is Not Required to Maintain Separation of Powers Between the Branches of Government.

Because recognition of a deliberative process privilege would contravene the policy declared in IPRA, it could properly be asserted as a basis for denying an IPRA request only if necessary to enforce the separation of powers contemplated by the state Constitution. But unlike the more narrow and stronger "executive communications privilege," the deliberative process privilege is not constitutionally based, and therefore its assertion cannot be justified on that basis.

1. The deliberative process privilege is not a constitutionally mandated privilege.

The concept of "executive privilege" encompasses several different types of privilege claims, only one of which is constitutionally based. *See* C.A. Wright & K. Graham, *Federal Practice and Procedure: Evidence*, § 5680 (1992) (identifying at least five different types of executive privilege claims). The two main types of privilege that have been identified and applied by courts are the executive communications and deliberative process privileges. *See In re Sealed Case*, 121 F.3d 729, 736-40 (D.C. Cir. 1997) (describing and distinguishing the two privileges). The executive communications privilege was originally intended "to preserve the confidentiality of presidential communications" and applies only to communications that involve the President himself or, potentially, the President's "chief advisors." *See id.* at 738, 752. In recent years, it has also been adopted by some state courts and has been applied to communications involving a state's chief executive officer or other elected members of the executive branch. *See, e.g., Killington, Ltd. v. Lash*, 572 A.2d 1368, 1374 (Vt. 1990). The deliberative process privilege, in contrast, protects "recommendations, draft documents, proposals, suggestions, and other subjective documents" prepared by executive branch employees. *See Coastal States Gas Co. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Although the deliberative process privilege applies to documents generated by a broader group of executive staffers, it applies only to materials that are "predecisional" and "deliberative." *See In re Sealed Case*, 121 F.3d at 737.

It is only the executive communications privilege that is "inextricably rooted in the separation of powers under the Constitution."[5] *United States v. Nixon*, 418 U.S. 683, 708 (1974). The deliberative process privilege, in contrast, has no such constitutional basis, and has instead been universally described as a common law privilege. *See In re Sealed Case*, 121 F.3d at 737 (the deliberative process privilege "originated as a common law privilege"); *Vaughn v. Rosen ("Vaughn II")*, 523 F.2d 1136, 1146 (D.C. Cir. 1975) (the deliberative process privilege is a common law privilege "shorn of any constitutional overtones of separation of powers.").[6] The Legislature, therefore, was free to reject the privilege when deciding what exceptions to allow to IPRA.

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[5] Although discussing this privilege in passing, the Court of Appeals did not apply the executive communications privilege and did not hold that the redacted information could have been withheld under that privilege, and MVD has not argued that the executive communications privilege applies. Nor could it, as that privilege only applies to communications involving high level members of the executive branch. *See In re Sealed Case*, 121 F.3d 746-47.

[6] *See also Times Mirror Co.*, 813 P.2d at 249 n.10 ("[T]he term 'executive privilege' as used here and by the federal courts in interpreting the FOIA does not refer to whatever constitutional content the doctrine might have, *see United States v. Nixon* (1974) 418 U.S. 683, but rather to the traditional common law privilege that attached to confidential intraagency advisory opinions, a privilege which was later codified in exemption 5."); *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 782 (Del. 1995) (describing the privilege "codified in the fifth exemption to the Federal Freedom of Information Act" as a "common law privilege," while recognizing that the executive communications privilege "stems from the doctrine of separation of powers.").

2. This Court has neither adopted the deliberative process privilege nor declared the privilege to be required under the Constitution.

Despite the virtual consensus that the deliberative process privilege has no constitutional origin, the Court of Appeals read this Court's opinion in *First Judicial* as not only adopting the deliberative process privilege, but conferring constitutional status on that privilege, such that IPRA could not abrogate the privilege.[7] *See* Opinion ¶ 32. A close reading of *First Judicial*, however, does not support this conclusion.

The *First Judicial* Court was asked to determine whether trial courts hearing tort claims arising out of the 1980 riot at the New Mexico State Penitentiary could compel New Mexico's Attorney General to release materials related to his investigation into that incident. *See First Judicial*, 96 N.M. at 256, 629 P.2d at

[7] The Court of Appeals also applied the "rule of reason" in affirming MVD's decision to deny Plaintiffs' records request, although it is not clear whether the Court considered this an independent justification or if the Court believed that the deliberate process privilege could be asserted through the rule of reason exception. *See* Opinion ¶¶ 25, 27. The "rule of reason" was adopted by this Court when interpreting an earlier version of IPRA that contained no express exceptions. *See Newsome*, 90 N.M. at 797, 568 P.2d at 1243. At that time, the Court invited the Legislature to adopt specific exceptions "to delineate what records are subject to public inspection and those that should be kept confidential in the public interest." *Id.* The Court then indicated that, ***"[u]ntil the Legislature gives us direction in this regard***, the courts will have to apply the 'rule of reason' to each claim for public inspection as they arise." *Id.* (emphasis added). The Legislature responded, and adopted the current version of IPRA, which now defines public records and requires disclosure of those records, but includes twelve specific exceptions. *See* § 14-2-1(A). Because the Legislature has now spoken, the Court should not recognize an additional, non-statutory exception to IPRA.

332. The Court held that some form of "executive privilege is required by the Constitution of the State of New Mexico." *Id.* at 257, 629 P.2d at 333. The Court then held that the Attorney General had the right to claim this privilege. *See id.* at 258, 629 P.2d at 334. Although describing the privilege in broad terms, the *First Judicial* Court left two key questions unresolved: (1) which form of executive privilege it was recognizing and (2) whether and to what extent it was adopting the limitations recognized by other courts on the scope of executive privilege.

Although the *First Judicial* Court did not indicate which form of executive privileges it intended to adopt, the decision can most logically be read as applying the executive communications privilege. Indeed, the very fact that the Court described the privilege in constitutional terms suggests that the Court had in mind the executive communications privilege, and not the deliberative process privilege. Moreover, the documents at issue in *First Judicial* would not have been protected under the deliberative process privilege, because there was no indication that the documents were either predecisional or deliberative -- i.e., that they included the opinions or recommendations of government officials in regard to an ongoing policy discussion. Instead, the documents were part of an investigative file and would likely have included large amounts of purely factual material. *See First Judicial*, 96 N.M. at 256, 629 P.2d at 332. Thus, *First Judicial* should be read as an application of the executive communications privilege to the Attorney General

as an elected member of the executive branch, as the documents at issue were prepared for and involved direct communications with the Attorney General. *See id.*; *see also Doe v. Alaska Superior Court*, 721 P.2d 617, 623 (Alaska 1986) (interpreting *First Judicial* as adopting "an executive privilege analogous to the President's").

The Court of Appeals suggested that the *First Judicial* Court must have intended to adopt the deliberative process privilege because it cited to *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), which has been interpreted as recognizing the deliberative process privilege.[8] *See* Opinion ¶ 32. The mere citation to *Carl Zeiss* is insufficient grounds to conclude that the *First Judicial* Court intended to adopt the deliberative process privilege, especially when the Court included no discussion of that privilege or its parameters, and applied only the executive communications privilege. The *First Judicial* Court cited that case only when citing the general policy concerns that support the adoption of the executive communications privilege. *See First Judicial*, 96 N.M. at 258, 629 P.2d at 334. Moreover, *Carl Zeiss* has been cited in cases that adopted and applied only the executive communications privilege, including the only other executive privilege case cited by *First Judicial* -- *United States v. Nixon*, 418 U.S. at 708

[8] The Court also cited a law review article in asserting that *First Judicial* has been interpreted as adopting the deliberative process privilege. *See* Opinion ¶ 32. But as noted above, *First Judicial* has also been read as adopting only the executive communications privilege. *See Doe v. Alaska Superior Court*, 721 P.2d at 623.

n.17; *see also Killington*, 572 A.2d at 1372 n.3 (citing *Carl Zeiss* in an opinion applying only the executive communications privilege). Even MVD has recognized that *First Judicial*'s citation to *Carl Zeiss* does not reveal an intent to adopt the deliberative process privilege as it has been applied in federal courts. Before the Court of Appeals issued its opinion, MVD argued that *First Judicial* did ***not*** adopt two separate and distinct privileges, but had adopted a "single, unified privilege" that combined the features of both the executive communications and the deliberative process privilege and thus allowed any employee of the executive branch to invoke the privilege for documents that contain either deliberations or, potentially, mere communications. [R.P. 0133-0134] Although this position is wholly untenable -- as such an interpretation would create a privilege of unprecedented scope and essentially allow state agencies to shield any documents from public scrutiny -- these arguments reveal that *First Judicial* has not and should not be read to adopt the deliberative process privilege as it has been applied in the federal courts, such that there would be any reason to conclude that the Legislature intended to provide a deliberative process exception to IPRA through the "otherwise provided by law" provision.

3. <u>The deliberative process privilege is an unwarranted restriction on the public's right to information about the workings of government</u>.

Because recognition of the deliberative process privilege is not required by First Judicial, or the state Constitution, and would be contrary to the Legislature's policy fostering open government, this Court should plainly and unequivocally reject it. There are ample reasons to do so.

When weighed against the public's right to information about the workings of government, the justification for the deliberative process privilege is feeble at best. The common justification offered for the privilege is that government employees must feel free to offer ideas without fear of embarrassment. *See, e.g., U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) ("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions' by protecting open and frank discussion among those who make them within the Government[.]"). The supposed dangers in revealing the discussions that go into a government agency's policy decision, however, are purely theoretical. *See Babets v. Secretary of Human Services*, 526 N.E.2d 1261, 1266 (Mass. 1988) ("We think that the defendants' assertions (which are unsupported by any empirical evidence) are speculative in light of the long history of the Commonwealth and the lack of any showing of real harm that has accrued

from the absence of the privilege.").[9] Indeed, MVD has never presented any evidence that the executive branch in states that have rejected the privilege has been unable to function properly.

While the benefits of the privilege are unsubstantiated and suspect, the privilege could cause substantial harm. Recognition of the privilege could "undermine the public trust 'in the integrity of the government and its commitment to serving the public interest[,]'" if citizens believe that government officials cannot be held accountable for their decisions. *See Birkett v. City of Chicago*, 705 N.E.2d 48, 52 (Ill. 1998) (quoting G. Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Process Privilege*, 65 Ind. L.J. 845 (Fall 1990) in explaining its rejection of the deliberative process privilege). Moreover, the deliberative process privilege shields the information that is perhaps most vital to an informed citizenry: information showing how diligently government officials are performing their duties. *See* M. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U.L. Rev. 1769, 1773 n.28 (Summer 2005) ("The ironic premise of the deliberative process privilege appears

[9] *See also* G. Wetlaufer, *supra*, 886-87 ("The evidence that has been proferred by the executive is nothing but the repeated recitation of the bare conclusory assertion that disclosure will cause chilling. ... [T]he proponents of this privilege have never offered any kind of formal empirical evidence in support of this assertion."); *cf. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 29 (speculation about potential harm did not provide sufficient reason to allow county to withhold records responsive to an IPRA request).

to be that a democratic government functions more effectively when the electorate remains ignorant of how government decisions are actually reached."). Even if that limitation on public access were acceptable, there is an inherent danger that agencies will adopt an overly broad interpretation of the privilege when responding to records requests, and that the judicial process will not be sufficient to remedy such action. *See Mead Central Data v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 n.16 (D.C. Cir. 1977) ("Congress was aware that an overbroad interpretation of exemption five could nearly nullify the disclosure mandate of the FOIA ... ."); *see also Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 76 (2nd Cir. 2002) (FOIA exemption five must be read narrowly because it hinders the ability of citizens "to hold the governors accountable to the governed.") (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). Indeed, the deliberative process privilege has the perverse effect of "encourag[ing] the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed." *Vaughn v. Rosen ("Vaughn I")*, 484 F.2d 820, 826 (D.C. Cir. 1973). The better public policy is to allow citizens to find out how government officials came to make policy judgments that affect their lives.

The Court would not be taking a novel stand by rejecting the deliberative process privilege, but would join several other states courts that have deemed the deliberative process privilege to be an undue restriction on the right of access to

public records. *See, e.g., Sands v. Whitnall School Dist.*, 754 N.W.2d 439, 458 (Wis. 2008) (indicating that a deliberative process privilege would be counter to the state's "strong policy of transparency and access" and "detrimental to the search for truth central to our adversary process").[10] In contrast, only a few state courts have chosen to adopt the deliberative process privilege through decisional law. Notably, several of those courts based their decision on the faulty assumption that the deliberative process privilege was well rooted in the common law. *See, e.g., Fuller v. City of Homer*, 75 P.3d 1059, 1063 (Alaska 2003) ("[W]e have recognized that at common law courts recognized a deliberative process

[10] *See also Birkett*, 705 N.E.2d at 52 (concluding that the privilege would hinder the fact-finding process in litigation); *see also Rigel Corp. v. Arizona*, 234 P.3d 633, 640-41 (Ariz. Ct. App. 2010) ("[T]he deliberative process privilege has not heretofore been adopted in Arizona ... We will not, via decisional law, create this privilege at this time."); *Babets*, 526 N.E.2d at 1264 (rejecting the deliberative process privilege as contrary to the "the fundamental principle that the public has the right to every man's evidence") (citations omitted); *The News and Observer*, 412 S.E.2d at 10 (declining to adopt the deliberative process privilege); *Tobaccoville USA, Inc., v. McMaster*, 692 S.E.2d 526, 530 (S.C. 2010) ("South Carolina courts have not previously addressed whether [the deliberative process] privilege is recognized in this state. We decline to adopt this privilege in South Carolina."); *Trombley v. Bellows Falls Union High School District*, 624 A.2d 857, 862 n.5 (Vt. 1993) ("Executive privilege ... is limited to communications with the Governor of Vermont. ... We do not see how it can be extended to a school board grievance decision and associated documents."). Several other states have not yet decided whether to adopt a deliberative process privilege. *See, e.g., Guy v. Judicial Nominating Comm'n*, 659 A.2d at 784 n.2 (citing a chancery court decision which concluded that Delaware had not adopted the deliberative process privilege); *Freudenthal*, 233 P.3d at 942 (finding no authority for a common law deliberative process privilege in Wyoming and leaving unresolved the question of whether Wyoming's public records act incorporated the deliberative process privilege).

privilege."); *City of Colorado Springs v. White*, 967 P.2d 1042, 1047 (Colo. 1998) (describing the deliberative process privilege as "a widely recognized confidentiality privilege asserted by government officials."). Others relied on federal law without considering the public policy implications of the decision to adopt the privilege. *See, e.g., DR Partners v. Board of County Comm'rs of Clark County*, 6 P.3d 465, 469 (Nev. 2000); *In re Liquidation of Integrity Ins. Co.*, 754 A.2d 1177, 1182 (N.J. 2000); *but see LaValle v. Office of General Counsel of the Commonwealth of Pennsylvania*, 769 A.2d 449, 458 (Pa. 2001) (concluding that the Pennsylvania Right to Know Act exempts pre-decisional materials from disclosure).

Because the Legislature chose not to provide an exception for the deliberative process privilege, because recognition of the privilege is not required under the Constitution, and because the recognition of the privilege would be contrary to the legislatively determined public policy of this State, this Court should conclude that there is no deliberative process exception to IPRA and should reverse the decisions of the trial court and the Court of Appeals holding otherwise.

II. IN THE ALTERNATIVE, IF THE COURT DECIDES TO ADOPT THE DELIBERATIVE PROCESS PRIVILEGE, THE COURT SHOULD REJECT THE FORMLESS STANDARDS ADOPTED BY THE COURT OF APPEALS.

If this Court decides to recognize the deliberative process privilege as an exception to IPRA, it should take this opportunity to clarify the scope of that

information, that conclusion does not provide a basis to allow MVD to refuse to disclose the information when the trial court could have addressed this concern through less restrictive means, either by accepting Plaintiffs' offer to submit sworn affidavits or entering an order prohibiting Plaintiffs from redisclosing the information they obtained. Accordingly, the Court should reverse the decision of the Court of Appeals allowing MVD to redact the requested information.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the decisions of the Court of Appeals and the trial court.

Respectfully submitted,

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Dear Commission Members:

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Very truly yours,

PEIFER, HANSON & MULLINS, P.A.

Charles R. Peifer/by ncd w/ permission

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Sincerely,

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